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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

STATE OF NEW YORK,

Petitioner,

v.

RANDOLPH PETER TOMPKINS,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals in the State of New York.

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In The

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October Term, 1978.

State of New York,

Petitioner,

v.

Randolph Peter Tompkins,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals in the State of New York.

The District Attorney of Dutchess County, New York, on behalf of the People of the State of New York, petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York in the above-captioned case.

Opinions Below.

The opinion of the Court of Appeals of the State of New York (App. A., *infra*) is reported at 45 N. Y. 2d 748, 380 N. E. 2d 311, 408 N. Y. S. 2d 485. The opinion of the New York State Supreme Court, Appellate Division, Second Judicial Department, pertaining to the

Dutchess County prosecutions (App. C., *infra*), is reported at 60 A. D. 2d 875, 401 N. Y. S. 2d 268.[1]

Jurisdiction.

The judgment of the Court of Appeals of the State of New York was rendered on July 13, 1978. By order dated October 6, 1978, Mr. Justice Marshall extended petitioner's time to file a petition for a writ of certiorari to and including November 10, 1978. By order dated October 24, 1978, the Court of Appeals of the State of New York ordered that its remittitur be amended (*see* App. B., *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

How Federal Question is Presented.

The legal issue raised in the County Court of Dutchess County was whether the defendant had the "ability" as a matter of law to make statements to law enforcement officers in the absence of his counsel.[2] In the Dutchess County District Attorney's briefs which were filed with the Appellate Division, Second Judicial Department, and with the New York State Court of Appeals, it was argued that a rule precluding a defendant from waiving his right to counsel and his right to remain silent outside the physical presence of his attorney would conflict with this Court's decision in *Faretta v. California*, 422 U. S. 806 (1975).

[1]In the Court of Appeals of the State of New York, two appeals pertaining to Randolph Peter Tompkins, one from Dutchess County and one from Orange County, were consolidated. The opinion of the New York State Supreme Court, Appellate Division, Second Judicial Department pertaining to the Orange County prosecution (App. D., *infra*), is reported at 57 A. D. 2d 870, 394 N. Y. S. 2d 234.

[2]No memoranda of law were submitted to the County Court.

By Order dated October 24, 1978, the New York State Court of Appeals directed that its remittitur be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Does the New York Rule precluding a defendant in police custody from waiving his right to counsel, outside the physical presence of his attorney, once that attorney has entered the criminal proceedings, violate the defendant's right to dispense with the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

(*see* App. B., *infra*)

Question Presented.

Does a *per se* rule precluding a defendant in police custody from waiving his right to counsel, outside the physical presence of his attorney, once that attorney has entered the criminal proceedings, violate the defendant's right to dispense with the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

Constitutional Provisions Involved.

The pertinent portion of the Sixth Amendment of the United States Constitution provides: "In all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The pertinent portion of the Fourteenth Amendment of the United States Constitution states: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."

Statement.

On December 19, 1974, Randolph Peter Tompkins and a co-defendant surrendered at New York State Police Troop K Headquarters in Washington Hollow (Dutchess County) in connection with Dutchess County, Village of Millbrook burglary charges for which arrest warrants had been issued (71-72; 89-90).[3] Either at the time they surrendered or shortly thereafter, Rudolph P. Russo, Esq. appeared at the State Police barracks and told New York State Police Investigator Roger Fairchild that he represented Randolph Peter Tompkins (72-73; 92).[4] Fairchild told Russo that in addition to being "booked" on the Village of Millbrook burglary charges, Tompkins and his co-defendant would be placed in a lineup in connection with an Orange County robbery investigation (74-75, 94-95).

At approximately 5:00 P.M. that day, Tompkins and his co-defendant were arraigned by the Village of Millbrook Justice and Randolph Peter Tompkins was remanded to the Dutchess County Jail in lieu of bail (97).

After posting bail, Tompkins was released. At approximately 11:00 A.M. on December 23, 1974, Investigators John Heffron and Anthony Carufe who were assigned to the State Police station at Fishkill (Dutchess County) arrested Randolph Tompkins in connection with a robbery of a 7-11 Store in Dutchess County (22-23). After the arrest, Tompkins and the two investigators re-

[3]Numbers in parentheses refer to the pages of the Appendix which the Dutchess County District Attorney filed with the Appellate Division, Second Judicial Department.

[4]The Appellate Division found that attorney Russo accompanied Randolph Peter Tompkins to the State Police Headquarters (57 A. D. 2d 870, 871, 394 N. Y. S. 2d 234, 235, and 60 A. D. 2d 875, 876, 401 N. Y. S. 2d 268, 269).

turned to State Police Fishkill where Heffron advised Tompkins of his rights to remain silent and to have the assistance of counsel, pursuant to the requirements of *Miranda v. Arizona,* 384 U. S. 436, 444 (1966). Randolph Peter Tompkins stated that he understood his rights and would speak to the police without the presence of an attorney (26-27). Tompkins did not advise Heffron that he was represented by counsel and he never asked if he could telephone attorney Russo or any other attorney (51-52, 57-58). At the time, Investigator Heffron did not know that Tompkins had been arrested or questioned on December 19, 1974, and did not know that Tompkins had been arraigned on the burglary charges in the Village of Millbrook (40-41, 47-48). Heffron told Tompkins that another participant in the 7-11 Store robbery had confessed and had implicated Randolph Peter Tompkins (24-25). Tompkins asked to see his accomplice's statement and a copy of it was given to him (29). Then he asked if he could telephone his mother and that request was honored by the police (27, 30). After Tompkins spoke with his mother, Investigator Heffron spoke to her. She advised the Investigator that she was coming to the barracks and he said that was alright with him (27-28). A few minutes later, Tompkins received a telephone call and when he completed that call, he told Investigator Heffron that he had just spoken to his attorney and that his attorney told him not to talk to the police, but that he, Tompkins, was going to talk anyway (28). Tompkins then told Heffron about the two robberies and later the substance of that oral statement was reduced to writing. As Heffron was typing Tompkins' statement, Tompkins' mother arrived at the State Police barracks (31). When Heffron finished typing, he gave a copy of the statement to Tompkins; he gave another copy to Tompkins' mother and he retained a copy for himself. Heffron then read the statement to Tompkins and his mother. Upon completion of that reading, Investigator Heffron asked

Randolph Peter Tompkins if he wished to make any additions or deletions to the statement. Tompkins did not request that any changes be made; he indicated that the typewritten statement was correct and signed it (98-104) in the presence of his mother and Investigators Heffron and Carufe (33-34).

At no time did Heffron or any other police officer threaten or coerce Tompkins or make any promises to him to induce him to make that statement. Also, Tompkins appeared to be in good physical condition and did not make any complaints to Heffron before or during the time the statement was given (34-35).

That evening at approximately 7:00 P.M. Tompkins was arraigned on the robbery charge and at his request he was returned to the State Police barracks (34). Later that night he was questioned about the burglaries in Millbrook and gave a written statement (105-113) admitting his participation in those crimes (67-68). Finally, at Randolph Peter Tompkins' request, the State Police allowed him to spend the night in the bedroom at State Police Fishkill because he "had done a lot of talking about people and he didn't want to go back on the street" that night (34; *see* 59).

Randolph Peter Tompkins was indicted in both Dutchess and Orange Counties for his participation in the various robberies and burglaries.[5] On July 2, 1976, a pre-trial hearing was held in Orange County to determine whether Tompkins' admission of his participation in the Orange County robbery should be suppressed. At the conclusion of that hearing, the defendant's motion to suppress was granted (App. F., *infra*).

[5]Because the robberies were unrelated and were committed in different counties, Randolph Peter Tompkins was indicted in the two counties where the crimes were committed. N. Y. Criminal Procedure Law Section 20.40.

In January 1977, when a pre-trial hearing was to be held in the Dutchess County Court concerning the Randolph Peter Tompkins' confession to the Dutchess County robbery (which had been suppressed with respect to the Orange County robbery) and Tompkins' separate confession to the burglaries, it was stipulated by the parties that the minutes of the Orange County hearing and the two statements, would be deemed the record for purposes of the Hearing in Dutchess County. The Dutchess County Court then granted defendant's motion and suppressed both statements (App. E., *infra*).

The District Attorneys of Orange and Dutchess Counties appealed to the Appellate Division, Second Judicial Department. In the Orange County appeal, a divided court reversed the order of the County Court and denied the motion to suppress. The majority found that the defendant had the assistance of counsel via the telephone and, therefore, he could and did waive his rights to have counsel present during the questioning. The dissenting justices stated that the purported waiver was ineffective because it was not made in the actual physical presence of his attorney (App. D., *infra*). In the Dutchess County appeal, the Appellate Division (citing its decision in the Orange County appeal [App. D., *infra*]) reversed the order of the County Court and denied the motion to suppress (App. C., *infra*).

The Court of Appeals of the State of New York reversed the orders of the Appellate Division and granted the defendant's motions to suppress because the defendant's decision to waive his right to counsel was not made in the physical presence of that attorney. In reaching that conclusion, the Court of Appeals considered whether a per se rule precluding a defendant in police custody from waiving his right to counsel outside the physical presence of his attorney, once that attorney has entered the criminal proceedings, violates the defendant's right

to dispense with counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and found that such rule did not violate that right.

Reasons for Granting the Writ.

This case presents a question of substantial, practical importance in the administration of criminal justice concerning the power of a criminal defendant to waive his constitutional rights and the right of law enforcement officers to rely on that waiver. The decision below conflicts with the decisions of other courts as to a defendant's ability to waive his rights to the assistance of counsel.

It is well settled that a criminal defendant has the power to make a knowing, intelligent and voluntary waiver of his constitutional rights. *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938). Moreover, the rights to remain silent and to have the assistance of counsel are personal rights belonging to the defendant. *Faretta v. California*, 422 U. S. 806, 819 (1975) (counsel); *Miranda v. Arizona*, 384 U. S. 436, 460 (1966) (remain silent).

The New York State Court of Appeals has found that a criminal defendant cannot reject the advice of counsel not to discuss the charge with the police unless the attorney is physically present at the time defendant wishes to make the waiver.[6] A similar argument was presented

[6]The United States Court of Appeals for the Tenth Circuit had previously ruled that a statement obtained by an interview with a criminal defendant who had retained or appointed counsel could not be used in evidence for any purpose unless the accused's attorney was notified of that interview and given a reasonable opportunity to be present. The Circuit Court was not concerned with a violation of the defendant's constitutional rights, but rather with a violation of the Canons of Ethics. *United States v. Thomas*, 474 F. 2d 110, 112 (7th Cir.), *cert. denied*, 412 U. S. 933 (1973). The Court only required notice to the attorney, not the physical presence of the attorney.

to the Court of Appeals of the District of Columbia in *King v. United States*, 370 A. 2d 1370, 1371 (D. C. Ct. App. 1977). The *King* court rejected the argument finding that the decisions of this Court did not support a rule that once a defendant is represented by counsel, a defendant lacks the capacity to voluntarily speak with the police outside the presence and without the consent of his attorney. Also, when Virginia was asked to adopt a rule that a defendant, who was represented by counsel, could only waive his right to counsel in the presence of that attorney, the Court specifically declined to do so. *Lamb v. Commonwealth*, 217 Va. 307, 227 S. E. 2d 737, 740 (1976). Similarly, in *Jones v. State*, 38 Md. App. 288, 380 A. 2d 659, 662-63 (1977), the Court ruled that the right to counsel, like any other right, may be waived. Therefore, even though counsel had been retained previously, a defendant could make a valid voluntary waiver of his right to remain silent outside the presence of his attorney and without prior notification to that attorney. In *State v. Nicholson*, 77 Wash. 2d 415, 463 P. 2d 633, 636-37 (1969), the Court ruled that where a defendant had been advised by counsel to exercise his right to remain silent, that defendant could still validly waive his rights to have counsel present and to remain silent; there was no requirement that the police notify a defendant's attorney that the defendant was waiving those rights. Likewise, in *State v. Johnson*, 223 Kan. 237, 573 P. 2d 994, 999 (1977), the Court found that a defendant for whom counsel had been appointed could, after being given the appropriate warnings, waive his right to have counsel present during questioning. The Supreme Court of California in *People v. Wong*, 18 Cal. 3d 178, 555 P. 2d 297, 301, 133 Cal. Rptr. 511 (1976) held that prior to the time charges were filed, a criminal defendant, who was represented by counsel, could waive his right to have his attorney present when he was interrogated by the police; prior knowledge or consent of his attorney was

not a pre-requisite to a valid waiver. *Accord, Biddy v. Diamond,* 516 F. 2d 118, 123 (5th Cir. 1975); *cert. denied,* 425 U. S. 950 (1976); *State v. Sample,* 107 Ariz. 407, 489 P. 2d 44, 46 (1971); *State v. Hatton,* 95 Idaho 856, 522 P. 2d 64, 71 (1974).

The disagreement expressed among these courts was also expressed in *United States v. Durham,* 475 F. 2d 208 (7th Cir. 1973). There, one judge stated that there was a per se rule against waiver of a previously appointed or retained counsel where the defendant's attorney had not been previously notified of the proposed interrogation. Two other judges of the panel disagreed. One found that there could be a waiver but that the record did not indicate an understanding relinquishment of a known right by this defendant. The third member of the panel found that there had been a knowing, voluntary and intelligent waiver.

In addition to the fact that there are conflicting opinions this issue, the decisions of this Court imply that the defendant has the right to make a knowing, intelligent and voluntary waiver without the consent of his attorney. *Brewer v. Williams,* 430 U. S. 387 (1977). There, this Court found that the defendant had not waived his rights under the Sixteenth and Fourteenth Amendments, but this Court also specifically stated:

> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel have waived his rights under the Sixth and Fourteenth Amendments.

Id. at , 97 S. Ct. at 1243 (emphasis original). Thus, the specific issue raised in this case was not resolved in *Brewer.*

While the Sixth and Fourteenth Amendments guarantee a defendant the right to the assistance of counsel, they do not create an obligation to have counsel or to follow the advice of that counsel. Where a defendant has access to his attorney and, in fact, speaks with his attorney, he has the assistance of counsel. Moreover, when a defendant is in police custody, neither he nor the police can compel a previously retained or appointed attorney to come to a police station. As a result, if a defendant can only waive his right to the assistance of counsel in the physical presence of his attorney once an attorney enters the proceeding, it becomes very easy for an attorney to prevent a defendant from making an effective waiver of his rights. All the attorney has to do is remain outside his client's physical presence. In *Faretta v. California, supra,* this Court characterized the function of an attorney as that of an "assistant" or a "tool" for the defendant. If the New York State Court of Appeals correctly imposed a legal disability precluding a defendant from waiving his right to the assistance of counsel outside the physical presence of counsel, then the attorney possesses greater power than that of an assistant. The attorney is no longer a tool which a criminal defendant may choose to use or ignore. Instead, the attorney becomes the master; he becomes an organ of the state and a means by which a defendant can be precluded from choosing his own defense strategy. In fact, if the rule established by the New York State Court of Appeals is correct, and is carried to its logical conclusion, once an attorney has been retained or appointed, a defendant lacks the power to discharge that attorney, as long as his attorney fails to enter the defendant's presence. At the very least, this seems to be in conflict with the spirit of this Court's decision in *Faretta v. California, supra.*

This Court should take the opportunity to clarify this area of the law and resolve the conflicting interpretations which have been given by a number of federal and state courts.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

November 6, 1978.

Respectfully submitted,

JOHN R. KING,
District Attorney of Dutchess County,
New York
WILLIAM V. GRADY,
Chief Assistant District Attorney
BRIDGET R. RAHILLY,
Assistant District Attorney
Attorneys for Petitioner.

APPENDIX A.

Decision of the Court of Appeals of the State of New York (45 N. Y. 2d 748, 380 N. E. 2d 311, 408 N. Y. S. 2d 485).

MEMORANDUM.

The orders of the Appellate Division are reversed, and the orders of the Orange County Court and of the Dutchess County Court are reinstated, and the cases remitted for further proceedings on the indictments. On December 23, 1974 defendant was arrested for an alleged robbery committed at a Seven-Eleven store in Fishkill, and was taken to the Fishkill Station of the State Police. After being read his *Miranda* rights, defendant asked why he was there and was told that an accomplice had given a statement implicating him in the robbery. He asked to see the statement and after reading it he became angry and stated that "if people want to talk, I'll do some talking." Defendant then requested and was given permission to call his mother. A few minutes later he received a telephone call from his attorney after which he told the investigating officer that his attorney had told him not to talk to the police but he was going to talk anyway. The police then interrogated him, obtaining confessions to the Orange County robbery and to a separate robbery which occurred in Dutchess County. In the prosecutions against defendant in the respective counties defendant moved to suppress the statements which motion was granted by both County Courts. The Appellate Division reversed each order and held the confession admissible.

Defendant contends that the statement was taken in violation of his right to counsel for "[o]nce a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in

the absence of the lawyer" (*People v. Hobson,* 39 N. Y. 2d 479, 481). The People concede, as they must, that an attorney representing defendant had entered the criminal proceeding but contend that defendant waived his rights, urging that the waiver was made with the assistance of counsel simply because he had talked with his counsel on the phone. This attenuated interpretation of the meaning of "presence of counsel" is totally unacceptable. Such a theory runs completely afoul of the very basis of the rule enunciated in *Hobson* (p. 484) where we said so clearly that "[t]he rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel only in the presence of a lawyer breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent, and voluntary". If a mere telephone call from counsel would serve this function it would be a short breath indeed.

The only remaining question is whether defendant's statement constitutes a spontaneous admission under the rule enunciated in *People v. Kaye* (25 N. Y. 2d 139). Unlike the situation in that case, the defendant here made no "spontaneous volunteered admission" at all. At best, it could be considered only as an attempt to make a spontaneous volunteered waiver of his right to counsel. It is suggested that we expand the *Kaye* rationale and hold that the making of his waiver thereby purifies the subsequent interrogation. We decline to do so. The *Hobson* rule is an unequivocal protection of basic rights guaranteed by our Constitution (*People v. Hobson,* 39 N. Y. 2d 479, 483, *supra; People v. Arthur,* 22 N. Y. 2d 325, 328) and once an attorney has entered a criminal proceeding on behalf of a defendant, the defendant in custody may not waive his right to counsel, spontaneously or otherwise, in the absence of the lawyer.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur.

APPENDIX B.

Remittitur of the Court of Appeals of the State of New York, as Amended.

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Charles D. Breitel, Chief Judge, Presiding.

2 No. 369

THE PEOPLE &c.,

Respondent,

vs.

RANDOLPH PETER TOMPKINS,

Appellant.

The appellant in the above entitled appeal appeared by John J. Hayden, Orange County Legal Aid Society; the respondent appeared by John R. King, District Attorney of Dutchess County.

The Court, after due deliberation, orders and adjudges that the order is reversed, the order of Dutchess County Court reinstated, and the case remitted to the County Court for further proceedings on the indictments in a memorandum. All concur. Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, *viz*: Does the New York Rule precluding a defendant in police custody from

waiving his right to counsel, outside the physical presence of his attorney, once that attorney has entered the criminal proceedings, violate the defendant's right to dispense with the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the County Court, Dutchess County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 13, 1978.
Amended by order of this Court dated October 24, 1978.

JOSEPH W. BELLACOSA

A true copy certified this 6th day of November, 1978.

DONALD M. SHERAW
Deputy Clerk

(Seal.)

APPENDIX C.

Decision of the New York State Supreme Court, Appellate Division, Second Judicial Department (Dutchess County Appeal), 60 A. D. 2d 875, 401 N. Y. S. 2d 268.

Appeal by the People from an order of the County Court, Dutchess County, dated January 28, 1977, which granted defendant's motion to suppress certain statements. Order reversed, on the law, motion denied, and case remanded to the County Court for further proceedings not inconsistent herewith. The issue is whether defendant's statements to the police were properly suppressed on the ground that he could not waive his right to counsel in the absence of previously engaged counsel. The hearing on which the present suppression order is based was held before a Judge of the County Court, Orange County. That court also granted defendant's motion to suppress certain statements made by him that implicated him in an Orange County robbery for which he had been indicted. That order was reversed by this court (*People v. Tompkins*, 57 A. D. 2d 870). The instant indictments in Dutchess County for robbery and burglary stem from defendant's statements made at the same time as he implicated himself in the Orange County crime. For the reasons stated in the majority decision in the prior appeal, which presented the same issue, on the same facts, established by the identical proof, the order here appealed should also be reversed (*People v. Tompkins, supra;* see, also, *People v. Coleman*, 43 N. Y. 2d 222). Latham and Rabin, JJ., concur; Hopkins, J.P., and Margett, J., concur in the result on constraint of the holding in *People v. Tompkins* (57 A. D. 2d 870).

APPENDIX D.

Decision of the New York State Supreme Court, Appellate Division, Second Judicial Department (Orange County Appeal), 57 A. D. 2d 870, 394 N. Y. S. 2d 234.

Appeal by the People from an order of the County Court, Orange County, dated July 19, 1976, which, after a hearing, granted defendant's motion to suppress certain statements made by him. Order reversed, on the law, motion denied, and case remanded to the County Court for further proceedings not inconsistent herewith. On December 19, 1974, at approximately noontime, defendant, in the company of his attorney, his mother and one George Gross, surrendered himself to the State Police in Poughkeepsie for booking on charges relating to a series of burglaries in the Millbrook section of Dutchess County on December 13, 1974. Defendant's attorney advised the police at that time that he did not want his client questioned. The attorney did not limit his representation to any particular charges and desired an expeditious arraignment. Thereafter, over objection from the attorney, defendant and Gross were placed in a lineup which, apparently unbeknownst to the attorney, pertained to a robbery committed at a restaurant in Newburgh in Orange County on November 5, 1974. The lineup was completed at 3:30 p.m., approximately two hours after the attorney had left police headquarters and returned to his office. Defendant was thereafter arraigned on the burglary charges and released. On December 23, 1974, while on bail on the burglary charges, defendant was arrested by the State Police in Fishkill, Dutchess County, for an alleged robbery committed at a Seven-Eleven store in Fishkill. Defendant's arrest on this charge was made on the basis of a written statement obtained from Gross. Defendant was advised of his rights, shown a copy of Gross' statement

and allowed to make a phone call to his mother. About 5 to 10 minutes later defendant received a call from his attorney, who advised him not to answer any questions. Defendant notified the police of his attorney's call and his advice, but stated that he wanted to talk to them anyway. Defendant was then questioned and, during the course thereof, implicated himself in the commission of the robbery in Newburgh, the subject of the instant indictment. Defendant's answers to this questioning were reduced to writing. The written confession states, in pertinent part: "I have been told by * * * the New York State Police, that I do not have to say anything and that anything that I say can and will be used against me in a Court of Law. I have also been told that I have the right to talk to a lawyer and have him present while I am being questioned * * * that if I can not afford to hire a lawyer, a lawyer would be appointed to represent me before any questioning * * * that I can exercise these rights at any time and not answer any questions or make any statements. Q. Do you understand each of the rights that I have explained to you? A. Yes. Q. Is it true that you have had the opportunity to talk with your mother previous to saying anything to me? A. Yes. Q. Is it also true that you had an opportunity to talk to your attorney on the telephone? A. Yes, that is true. Q. Do you still wish to talk with us? A. Yes. Q. Having these rights in mind do you wish to talk to us now? A. Yes." On December 26, 1974 defendant was taken to State Police Headquarters, where he was arrested and booked for the robbery in Orange County. He was again advised of his rights and made further admissions concerning his participation in the Orange County robbery. The trial court held that the statements elicited by the police from defendant on December 23 and December 26, 1974, insofar as they pertained to the robbery in Orange County (the subject of the instant indictment), were obtained in violation of defendant's right to counsel, and

that his purported waiver of his right to counsel was ineffectual in the absence of his lawyer. In so holding, the County Court ruled that any purported waiver of the right to counsel had to be measured against the rule stated in *People v. Arthur* (22 N. Y. 2d 325) and reaffirmed in *People v. Hobson* (39 N. Y. 2d 479, 481), i. e.: "Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer". We do not quarrel with, and indeed we recognize, the rule enunciated in *Arthur* and *Hobson*. Rather, it is our position that, under the facts of this case, defendant's waiver of his right to counsel was a valid and effective one. In this regard it should be noted that the Court of Appeals stated in *Hobson* (p. 481): "Any statements elicited by an agent of the State, however subtly, after a purported 'waiver' obtained without the presence or assistance of counsel, are inadmissible." In the case at bar, defendant was arrested on the basis of a written statement of an accomplice. He then had the benefit of "assistance" of his attorney through a telephone call from the latter. After conferring with his attorney on the telephone he chose to waive his right to counsel and decided to confess to the police. Under these facts, it cannot be seriously argued that defendant did not have the benefit of counsel before waiving his right to same. The constitutional principle enunciated in *Arthur* and *Hobson* was clearly meant to prevent the unwary suspect from over-bearing intimidation by the police, by insuring that the former's counsel would be available before any questioning could commence. The defendant was well aware of police procedures and practices. He was allowed to speak to his attorney over the telephone and, faced with incriminating evidence against him, freely chose to disregard his attorney's advice and to confess to the police. Under these circumstances, defendant's waiver of his right to counsel was valid, and the motion to suppress should have been denied. Gulotta, P.J., Latham and Suozzi, JJ., concur; Margett, J., dissents and votes to affirm the order, with the following memorandum, in which Mollen, J., concurs: I would affirm the suppression of defendant's confession by the County Court. The relevant testimony at the *Huntley* hearing was as follows: Rudolph P. Russo, an attorney, testified that he was retained to represent the defendant on December 18, 1974. The next day, December 19, Russo called the State Police and told them that defendant "understood they were looking for him". He told the police that defendant was in his office and offered to surrender defendant at the Troopers' Barracks in Millbrook. The police agreed to these arrangements and Russo arrived at the barracks just before noon on December 19. In addition to his client, Russo was accompanied by defendant's mother and by a codefendant, George Gross, who was also wanted by the police. Russo did not, however, represent Gross. According to Russo, he spoke with an investigator named Fairchild, who told him the police were going to take defendant into "the back room" for booking. Russo told Fairchild he wanted to be present, but that was not permitted. Russo then advised the investigator that he did not want any questions asked of his client. Fairchild assented. Russo inquired about three times during the course of the next hour or so, whether the booking had been completed. Each time the trooper at the desk told Russo that he would "look into it." Finally, at about 1:10 p.m., Investigator Fairchild approached Russo and told him that the defendant and Gross were going to be placed in a lineup. Russo testified that he was not told the purpose of the lineup. He stated that he requested to be present at the lineup, but that his request was denied. Russo then informed defendant's mother of the situation and departed. Russo "vaguely" recalled speaking to the defendant over the telephone a few days thereafter. His recollec-

tion was that he told defendant to be cooperative "but under no circumstances to answer any questions". On cross-examination Russo stated that he was paid a retainer by defendant's mother on December 19. It was Russo's recollection that he "may have" asked Investigator Fairchild on the 19th whether the lineup "had something to do with a robbery * * * I may have asked him that and he may have told me yes it did." He admitted that he couldn't specifically remember requesting to be present at the lineup. Investigator Roger Fairchild testified that defendant and Gross were booked on December 19, 1974 in connection with a series of burglaries which had been committed on December 13, 1974 in the Village of Millbrook. Booking took about an hour; shortly thereafter Fairchild received a message that Russo, who was in the waiting room, wanted to speak to him, Fairchild went to the waiting room where he was asked by Russo if there was any delay. Fairchild said he replied that there would be some delay; that the defendants were going to appear in a lineup. Russo then departed. According to Fairchild the lineup was held in connection with the robbery committed at a Carroll's restaurant in New Windsor or Newburgh on November 5, 1974. The defendant and Gross were suspects in this robbery on the basis of information which had been supplied by a third party participant. Subsequent to the lineup, at approximately 5:00 p.m. that day, defendant was taken before the Town Justice in the Village of Millbrook, arraigned on the burglary charges, and released on bail. No charges were lodged at that time in connection with the alleged robbery at the Carroll's restaurant. Investigator John Heffron, of the Fishkill Station of the State Police, testified that he arrested defendant at 11:15 a.m. on December 23, 1974. The arrest was in connection with a robbery committed at a Seven-Eleven store in Fishkill which had occurred on December 10, 1974. Defendant was taken to the Fishkill Station and placed in the senior investigating office, "which is a smaller office off

the main office." Defendant was given his *Miranda* warnings. Defendant asked why he was there and was told that an accomplice, codefendant Gross, had given a statement implicating him. Defendant wanted to see the statement and it was shown to him. According to Heffron, "evidently [the statement] made him a little mad, he cussed the other guy and he made the comment * * * if people want to talk, I'll do some talking." Defendant then requested, and was given, permission to call his mother. A few minutes later defendant received a telephone call. Investigator Heffron assumed the call was from defendant's attorney because when defendant hung up he told Heffron that he had just talked to his attorney, that his attorney had told him not to talk to the police, but that he was going to talk to the police anyway. Defendant thereupon confessed to both the robbery committed at the Seven-Eleven store, for which he had been arrested, and the November 5, 1974, Carroll's robbery in Newburgh (in connection with which he had been placed in a lineup on December 19, 1974). On cross-examination Investigator Heffron stated that he was unaware, on the date of defendant's arrest, of any burglary investigation involving the defendant; nor was he aware, when he arrested defendant, of a robbery investigation in connection with anything other than the robbery committed at the Seven-Eleven store. He did advise defendant, when defendant was picked up, that he was under arrest. After reading defendant his "rights", Heffron and defendant "got in a conversation about him getting flipped by an accomplice". Heffron didn't remember whether defendant told his mother to call his lawyer—"He may have". Five to 10 minutes after defendant finished speaking to his mother, he received a telephone call, apparently from his attorney. Based upon the foregoing testimony, and to a large extent upon *People v. Hobson* (39 N. Y. 2d 479), the County Court ordered suppression of defendant's confession with respect to the robbery committed at Carroll's restaurant

(only the Carroll's indictment was before the court). I concur with that determination. The rule set forth in *People v. Hobson* (*supra*) is clear and it is unequivocal. "Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the *absence* of the lawyer" (*People v. Hobson, supra,* p. 481; emphasis supplied). There are three exceptions to this rule. First, "the fact that a defendant is represented by counsel in a proceeding unrelated to the charges under investigation is not sufficient to invoke the rule". Second, "The rule applies only to a defendant who is in custody; it does not apply to noncustodial interrogation". Third, the rule "does not render inadmissible a defendant's *spontaneously volunteered* statement" (*People v. Hobson, supra,* p. 483; emphasis supplied). None of these exceptions apply in the case at bar. The County Court found that the defendant was represented by Mr. Russo in connection with the Carroll's robbery as early as December 19. The court noted that the People so concede, and on this appeal the People do not challenge that finding. Nor can there be any doubt that defendant was in custody at the time he "waived" his right to counsel. The only real issue is whether defendant's confession was "spontaneously volunteered". In setting forth this exception to the general rule, the Court of Appeals, in *Hobson,* cited *People v. Kaye* (25 N. Y. 2d 139, 144) and indicated that *People v. Robles* (27 N. Y. 2d 155, 159, cert. den. 401 U. S. 945) should be compared. In *Kaye,* the defendant had been surrendered to the police by his father and by his attorney in connection with a homicide. After informing defendant that he was being arrested for the homicide, the detectives placed him in their car to drive to the police station. "Almost immediately after entering the car and without being asked a single question, defendant blurted out, 'It's all a mistake, but I

know he forgave me. He's in heaven now. It didn't have to happen. I'm sorry I ever met him in the village.' The defendant repeated this statement several times and then began to discuss meeting the deceased" (*People v. Kaye, supra,* p. 141). Despite being reminded, at that point, that he didn't have to make any statements, the defendant persisted by saying, "I have nothing to hide. It was all a mistake. I know I'm forgiven. I want to tell my side of the story, and I want to leave it up to the courts and doctors to decide" (*supra,* p. 141). Defendant then went on to relate how he had choked and beaten the deceased 13-year-old boy to death. Defendant was convicted of manslaughter in the first degree, and the Appellate Division, First Department, affirmed the conviction (31 A. D. 2d 536) upon the ground that his confession was admissible as "a wholly voluntary statement *not the product of questioning*" (emphasis supplied). The Court of Appeals, in affirming, also laid stress on the fact that the confession was volunteered *before any interrogation* had *taken place.* "Absent interrogation, post-*Miranda* decisions have consistently held that volunteered or spontaneous statements made by suspects who were plainly in custody and had not been given the *Miranda* warnings are admissible" (*People v. Kaye,* 25 N. Y. 2d 139, 144, *supra*). It seems obvious from *Kaye* that a statement cannot truly be "spontaneously volunteered" where it is the product of "interrogation"; this is particularly so where it is the result of "custodial interrogation". *People v. Robles* (27 N. Y. 2d 155, *supra*), the case cited for comparison purposes in *Hobson,* presents a factual counterpoint to the *Hobson* rule, yet fleshes out the principles of law with regard to whether a confession is genuinely spontaneous and voluntary. On its facts, *Robles* constituted a departure from a line of cases highlighted by *People v. Arthur* (22 N. Y. 2d 325) and reaffirmed by *Hobson* (see *People v. Hobson, supra,* pp. 485-486). Robles was placed in a detention pen upon his arrival at the police station.

He was not questioned and, when his attorney appeared, he was left alone with the attorney in a clerical office for about 20 minutes. At the end of this 20-minute period, defendant's attorney came to the door of the office and asked the detective stationed there to "watch" the defendant. The detective entered the room and sat down on a desk facing the defendant. A second detective entered and gave the defendant a sandwich and coffee. The defendant spit his first bite of the sandwich into a wastebasket. The first detective, who had known the defendant prior to this occasion, after an inquiry regarding the refusal to eat, said: "Rick, did you ever think it would wind up like this?" The defendant replied, in the words of the detective, that "he thought it would, from what he read in the newspapers, that he thought someday he would be arrested for killing those two girls." The detective commented that defendant had made a mess of his life and concluded by asking: "Just what really happened?" The defendant then said, "I don't know * * * I went to pull a lousy burglary and I wound up killing two girls." Defendant's resulting conviction of murder was affirmed by the Court of Appeals. The *Arthur* rule, that once an attorney appears there can be no effective waiver unless made " 'in the presence of the attorney' ", was dismissed as a mere "theoretical statement" of the rule and a "dogmatic claim." That position has, of course, been abandoned by *Hobson's* reaffirmation of the *Arthur* rule. It is doubtful that *Robles* would today be decided as it was. Yet the Court of Appeals did go on, in *Robles*, to discuss the legal principles to be applied in determining whether a confession is spontaneous and voluntary. Citing *People v. Rodney P.* (21 N. Y. 2d 1), the court noted that an admission is inadmissible only " 'when the questioning takes place under circumstances which are likely to affect substantially the individual's "will to resist and compel him to speak when he would not otherwise do so freely." ' " Applying that standard to the facts of *Robles*, the court

concluded that the defendant's "outburst * * * was not the simple negative response which was all [that was] called for, but an impetuous unbosoming of his implication in the crime" (*People v. Robles*, 27 N. Y. 2d 155, 158, 159, *supra*). It was not, said the court, the result of "inquisitorial" process. In the case at bar, defendant's admission of guilt came only after he had been placed in the "Senior Investigating Office" ("a smaller office off the main office"),* only after he had engaged "in a conversation about him getting flipped by an accomplice", and only after he had then been shown a statement by an accomplice implicating him in a robbery. Surely the circumstances were calculated and likely to affect substantially his " 'will to resist and compel him to speak when he would not otherwise do so freely' " (*People v. Robles, supra*, p. 159; *People v. Rodney P.* (*supra*); see *People v. Cerrato*, 24 N. Y. 2d 1). The tactics employed in obtaining defendant's confession were not even very subtle, yet *Hobson* holds that "Any statements elicited by an agent of the State, however subtly, after a purported 'waiver' obtained without the presence or assistance of counsel, are inadmissible" (*People v. Hobson, supra*, p. 481). Nor is defendant's confession rendered "spontaneously voluntary" by virtue of the fact that he was read his *Miranda* warnings. "Notwithstanding that warnings alone might suffice to protect the privilege against self incrimination, the presence of counsel is a more effective safeguard against an involuntary waiver of counsel than a mere written or oral warning in the absence of counsel [citations omitted]. The rule that once a lawyer has entered the proceedings in connection with the charges under investigation, a person in custody may validly waive the assistance of counsel *only in the presence of a lawyer* breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and

*Cf. *Miranda v. Arizona* (384 U. S. 436, 449-457), where the recognized police technique of isolating a suspect in closed, unfamiliar police surroundings is discussed.

voluntary" (*People v. Hobson, supra*, p. 484; emphasis supplied). Once the police realized that defendant was represented by an attorney, all communication with reference to the charges under investigation should have ceased. The mere fact that defendant had just spoken to his lawyer over the telephone was, in my view, insufficient to negate the strong presumption against the People with respect to the voluntariness of defendant's waiver (cf. *Brewer v. Williams*, U. S.). Defendant's telephone conversation obviously took place in the midst of a prosecutorial atmosphere (cf. *People v. Ramos*, 40 N. Y. 2d 610, 618). Defendant may very well have felt intimidated from discussing the evidence he had been confronted with; evidence which did not even pertain to the Carroll's robbery. The actual physical presence of his attorney would have insured a full realization of the legal consequences of any statements he might choose to make and only in that case might such statements be considered truly voluntary. Were we dealing with a civil case, no matter how trivial, it would be unthinkable for the lawyer for one party to speak to the other party in the absence of the latter's attorney. Certainly, no less is to be expected or demanded when defendants in criminal cases are involved (*People v. Robles, supra*, dissenting opn. of Fuld, Ch. J.; cf. *United States v. Thomas*, 474 F. 2d 110, 112).

APPENDIX E.

Decision of the County Court of Dutchess County.*

The defendant Randolph Peter Tompkins has been indicted under indictment #61/75 for the crimes of Robbery in the First Degree, Robbery in the Second Degree, and Conspiracy in the Second Degree, committed in the Town of Wappinger on September 10, 1974, and under separate indictment #96/75 he has been indicted for the crimes of Burglary in the Third Degree (3 counts), Criminal Mischief in the Third Degree (3 counts), Petit Larceny (2 counts), and Grand Larceny in the Third Degree (1 count), committed in the Village of Millbrook on December 13, 1974.

In each of the two proceedings the people had given notice of intention to offer upon the trial alleged confessions and admissions of the defendant, and this hearing has been held pursuant to CPL §710.60, since defendant moved for suppression claiming the alleged confessions and admissions were involuntarily given and obtained.

By stipulation of the attorneys and the parties in open court these two proceedings have been consolidated for the purpose of conducting a Huntley hearing to permit the Court to make findings of fact and conclusions of law (CPL §710.60, subd. 4). The parties further stipulated that such determinations were to be made by the Court upon the minutes of a prior hearing held before the Hon. Angelo J. Ingrassia under indictment #56/75, Orange County Court, in a proceeding entitled *People v. Randolph Peter Tompkins* (People's Exs. 1 and 2) and the stipulations made in open court on November 30, 1976 and January 18, 1977, all of which are deemed to be the record of this combined hearing, as the factual circumstances surrounding the taking of the defendant's statements as re-

*This is an unreported decision.

flected in the record of the Orange County proceeding (People's Exs. 1, 2, 3) are conceded to be the same as those relating to the statements now sought to be suppressed in these proceedings.

The hearing has been conducted by the Court alone (*People v. Korda*, 24 A. D. 2d 577), and the only issue for determination is the voluntariness of the alleged confessions and admissions, and not the issue of their truthfulness or falsity, or the weight to be given by a jury on any of those issues. The burden of proof of such voluntariness is on the people (*People v. Huntley*, 15 N. Y. 2d 72; *People v. Veitch*, 25 A. D. 2d 494), and the prosecutor must prove the same beyond a reasonable doubt (*People v. Huntley, supra; People v. Veitch, supra; People v. Barton*, 30 A. D. 2d 764).

The decision of this Court in determining the issue of voluntariness must contain specific findings of fact and conclusions of law (*People v. Cronan*, 28 A. D. 2d 815; *People v. Veitch, supra; People v. Barton, supra*), and this Court must determine and decide in the decision whether the issue in question was proven beyond a reasonable doubt (*People v. Veitch, supra; People v. Cronan, supra*).

The people seek to prove that the defendant made written confessions and admissions which the prosecution may seek to introduce at the trial, namely:

FIRST: With respect to indictment #61/75, the defendant, on December 23, 1974 at the Fishkill State Police barracks at the request of State Police investigator John Heffron, made certain oral statements in response to questions which were reduced to writing, which written statement was received into evidence as People's Ex. 2.

SECOND: With respect to indictment #96/75, the defendant, at the same time and place as above indicated under above captioned paragraph First made certain oral statements in response to questions

which were reduced to writing, which written statement was received into evidence as People's Ex. 3.

The evidence indicates, and the following findings of fact are made therefrom:

On December 19, 1974, about 11:45 A.M., at the instruction of his attorney Rudolph P. Russo and in the presence of his attorney, defendant surrendered himself to the State Police at the barracks in Millbrook, New York, for the crimes alleged under indictment #96/75. At the time defendant was surrendered to the State Police, the attorney told investigator Roger Fairchild that he did not want defendant asked any questions adding that he was not to be interrogated; that defendant was not asked any questions about any criminal conduct, and he did not volunteer and make any statement about any criminal acts, or otherwise; that subsequent to 5:00 P.M. the defendant was taken to a local criminal court and arraigned for the Millbrook crimes (Indictment #96/75); that following arraignment a retainer was paid by defendant to attorney Russo for his representation and defense of the charges;

On December 23, 1974, acting on information supplied to them by the co-defendant George Gross, investigator Heffron arrested the defendant Tompkins for crimes charged in indictment #61/75 and took him to the State Police barracks in Fishkill, New York. Prior to interrogating him, the defendant was given his four-fold Miranda warnings and was permitted to telephone his mother. Approximately five to ten minutes later, the defendant, prior to making the oral statements which were reduced to writing (People's Exs. 2 and 3) received a telephone call, and upon the completion thereof, he told investigator Heffron that the call

was from his attorney, who had instructed him not to talk, but that he would talk anyway, whereupon he made the statements (People's Exs. 2 and 3) in response to the investigator's questions. At the time of the interrogation Heffron was unaware that defendant was represented by counsel for those crimes charged in indictment #96/75 and the subject matter of People's Ex. 3 for which he had been arrested and arraigned on December 19, 1974.

The defendant in both proceedings does not deny being given the mandatory so-called Miranda warnings nor does he claim that the statements obtained after the giving of such warnings were the product of undue influence or other impermissible coercive conduct of the interrogating officer. Instead, he concedes that the statements were given (People's Exs. 2 and 3) but argues he had no ability as a matter of law to make such statements in the absence of his counsel.

The Court of Appeals in *People v. Arthur* (22 N. Y. 2d 325) and *People v. Hobson* (39 N. Y. 2d 479) has established that:

> "The law in this State has long been settled that once a lawyer has entered a criminal proceeding representing a defendant in custody in connection with criminal charges under investigation, the prosecution cannot question the defendant in the absence of his attorney (*People v. Arthur*, 22 N. Y. 2d 325; *People v. Gunner*, 15 N. Y. 2d 226), nor can the defendant waive his right to counsel in the absence of his lawyer (*People v. Hobson*, 39 N. Y. 2d 479; *People v. Arthur*, 22 N. Y. 2d 325, *supra*)." *People v. Ramos*, 40 N. Y. 2d 610, 614.

The rigid manner in which such rule is applied is best illustrated by the *Hobson* decision, wherein the court disavowed exceptions to that rule that it had previously created in *People v. Robles* (27 N. Y. 2d 155) and *People v. Lopez* (28 N. Y. 2d 23).

With respect to the proceeding under indictment #61/75 the *Arthur* and *Hobson* decisions frame the threshold question which must be resolved in the proceeding at bar, namely, whether defendant's counsel had entered the proceeding representing the defendant so as to make ineffectual defendant's statements made contrary to his attorney's telephonic instructions not to make any statements. That question is answered in part by the recent decision of the Court of Appeals in *People v. Ramos* (40 N. Y. 2d 610) wherein the court held that once an attorney has taken affirmative steps relative to a contemplated interrogation that was about to commence, the interrogating officer may not further proceed without the presence of the defendant's attorney (*People v. Ramos, supra*, 615). Any real doubt as to the entrance into the proceedings by Russo can be dismissed for it is conceded by the people (Stipulation January 18, 1977, pp. 6 and 7; People's Ex. 2, p. 1, and Ex. 3, p. 1) that Russo in fact represented the defendant on December 23, 1974 when he was being questioned by Heffron.

Equally instructive in *Ramos* is the rule stated therein that if there is any question as to whether an attorney has entered a proceeding, a heavy burden rests upon the people to demonstrate that defendant has waived counsel intelligently and voluntarily. In the proceeding at bar, defendant, a youth, appeared more concerned about rebutting a statement attributed to a co-defendant than he was about his own rights. Such scenario suggests a hasty rather than a well reasoned decision by the defendant to waive his right to counsel being present and more importantly his right not to incriminate himself. Aside from Heffron's ignoring his obligation to refrain from questioning the defendant in view of his admitted knowledge that defendant's attorney had instructed him not to make any statements to him, it cannot be found that the people have met their burden in demonstrating that he took all those steps to insure that defendant's constitutional rights were protected.

Accordingly, any statements (People's Ex. 2) made by the defendant with respect to crimes charged under indictment #61/75 are suppressed.

The statements made by defendant concerning the crimes described in indictment #96/75 must be suppressed for even more compelling reasons. Defendant had been previously arraigned in said proceeding on December 19, 1974 and no question exists as to his representation by counsel in that proceeding, in fact the same is conceded. While this Court finds that interrogating officer Heffron was personally unaware of those circumstances, the people cannot rely upon such fortuitous lack of knowledge to sanction his questioning of defendant on those charges, a finding which is only made more compelling by his ignoring the fact that he knew that defendant had just talked with his attorney on the telephone (People's Ex. 2, p. 1, and Ex. 3, p. 1 and 7). Hence, the rule of *Arthur (supra)* and *Hobson (supra)* is more compelling with respect to this proceeding, as it is uncontroverted that an attorney had entered the proceeding, that the proceeding had been formally commenced by arrest and then followed by arraignment, and that defendant's waiver on December 23, 1974 of counsel previously retained on December 19, 1974 was not in the presence of that attorney.

The foregoing is conclusively bolstered by express instructions by defendant's counsel on December 19, 1974 at Millbrook that the State Police were not to question the defendant (Stipulation January 18, 1977, p. 6).

Accordingly, any statements (People's Ex. 3) made by the defendant with respect to crimes charged under indictment #96/75 are suppressed.

So ordered.

Dated: January 28, 1977

RAYMOND E. ALDRICH, JR.
Dutchess County Court Judge

APPENDIX F.

Decision of the County Court of Orange County.*

The operable facts on this motion to suppress admissions made by the defendant are concededly undisputed. Insofar as material to the Court's determination of the motion, they may be summarized as follows:

On the morning of December 19, 1974, at approximately 12:00 noon, the defendant, in the company of his attorney, Rudolph Russo, surrendered himself to the New York State Police at Troop K headquarters in Poughkeepsie, New York. This had been arranged by Mr. Russo who had learned that the State Police were looking for the defendant. The defendant was also accompanied at the time by his mother and by George Gross, who is a codefendant herein and who was also wanted by the police. Upon their arrival at headquarters, the defendant and Gross were separated from Mr. Russo. They were taken to the rear of the building for "booking" on charges relating to a series of burglaries which had occurred in the Millbrook section of Dutchess County on December 13, 1974. Over his objections, Mr. Russo was not allowed to be present during this procedure. He did, however, tell the officers that he did not want the defendant questioned. When he inquired concerning the delay, at approximately 1:00 p.m., he was told that the defendant and Gross were to be placed in a lineup. He objected to this and demanded that the defendant be expeditiously arraigned. He didn't recall whether he was told that he could be present at the lineup. At 1:15 p.m. he left the station house to return to his office. The lineup was not completed until after 3:30 p.m. This lineup did not pertain to the burglaries for which the defendants had been arrested but rather to the robbery of a Carroll's

*This is an unreported decision.

restaurant which had occurred in Newburgh on November 5, 1974. The defendant and Gross were suspects in this robbery on the basis of information which had been supplied by a third-party participant. The defendant was thereafter arraigned on the burglary charges and released.

On December 23, 1974, while on bail on the burglary charges, the defendant was arrested by the State Police for the alleged robbery of a Seven-Eleven store in Fishkill which had occurred on December 10, 1974. He was taken to the State Police barracks at Fishkill, which is approximately 20 miles from Poughkeepsie. He arrived shortly after 11:15 a.m. The arrest was made on the basis of a written statement which had been obtained from the codefendant, Gross. He was taken to the BCI section of the barracks where he was advised of his rights and shown a copy of Gross' statement. He asked and was allowed to make a phone call to his mother. Within 5 to 10 minutes, he then received a phone call, presumably from Mr. Russo. He thereupon told the police that the call was from his attorney, who had advised him not to answer any questions. He then said that he wanted to talk anyway. He told them that he had more to say than Gross. The police officers then proceeded to question him. During the course of the questioning the defendant mentioned and was questioned further concerning the Carroll's robbery. The questions and answers were reduced to a writing which the defendant signed at approximately 3:30 p.m. He was thereafter arraigned and returned to the barracks where, at his own request, he remained until December 26th.

The State Police officers who questioned the defendant at Fishkill and obtained the incriminating statement, were not personally aware that the defendant had four days earlier been booked at their Poughkeepsie headquarters for burglary; nor were they personally aware that the defendant was a suspect and had been in a lineup in connection with the Carroll's robbery.

On December 26, 1974, based on the admissions which had been obtained from the defendant and from Gross, the defendant was taken from the Fishkill barracks to the Newburgh barracks where he was arrested and booked for the Carroll's robbery. At Newburgh he was again advised of his rights and made further admissions concerning his participation in the Carroll's robbery.

As noted, the foregoing facts are undisputed. It was also undisputed, and the Court so finds, that at no time was the defendant threatened, beaten or physically mistreated. The issue to be resolved on this motion is whether the statements which were elicited from the defendant on December 23rd and December 26th and which pertain to the Carroll's robbery which is the subject of the instant indictment, were obtained in violation of the defendant's right to counsel. More specifically, the issue is whether or not the defendant effectively waived his right to counsel in connection with his making the admissions in question.

The People properly recognize that the efficacy of any purported waiver of counsel must be tested against the rule of *People v. Arthur* (22 NY 2d 325) which was recently reaffirmed and restated by the Court of Appeals in *People v. Hobson* (39 NY 2d 479). The rule is that "Once a lawyer has entered a criminal proceeding representing a defendant in connection with criminal charges under investigation, the defendant in custody may not waive his right to counsel in the absence of the lawyer" (*People v. Hobson, supra*, 481). In this case the People concede, as they must, that the defendant was represented by Mr. Russo in connection with the Carroll's robbery charges as early as December 19th and that the defendant was a suspect at that time. Given these facts, it would seem that the scope of the Court's inquiry is necessarily limited.

The rule of the *Arthur* case is admittedly not so broad that it would absolutely preclude all questioning of a defendant who is represented by counsel. It is accepted

that the rule is not automatically invoked merely because a defendant may be represented by counsel in some matter unrelated to the matter under investigation. Where the representation by counsel clearly does not relate to the charges under investigation, a defendant may effectively waive his right to counsel with respect to such charges, notwithstanding that his attorney is not present (*People v. Hobson, supra,* 283; *People v. Hetherington,* 27 NY 2d 242, 245; *People v. Taylor,* 27 NY 2d 327, 331-332). The People seek to extend this exception to cover the instant case.

The People argue that Mr. Russo's representation of the defendant on December 19th extended only to the Millbrook burglaries and the Carroll's robbery, and that therefore the police were privileged to question the defendant on December 23rd with respect to the Seven-Eleven robbery. They argue that the defendant properly waived his right to counsel in connection with the investigation of the Seven-Eleven robbery, and that under the particular circumstances presented, the waiver should be deemed to also cover the ensuing inquiry into the Carroll's robbery. In making their argument the People place great reliance upon the fact that the police officers who were questioning the defendant in Fishkill on December 23rd were unaware of what had transpired at their Poughkeepsie headquarters four days earlier. They maintain that the good faith of the police officers, coupled with the predisposition of the defendant to talk, should be sufficient to exempt this case from the operation of the *Arthur* rule.

The Court cannot accept the People's reasoning. Initially, it must be noted that the fact that the police officers who questioned the defendant were personally unaware that the defendant was represented by counsel is completely immaterial. Not only must these officers be presumed to have known of the representation, but they must also be bound by the specific instructions given by

Mr. Russo at Poughkeepsie that his client was not to be questioned (*People v. Gunner,* 15 NY 2d 226). Besides this imputed knowledge, the police officers in Fishkill received actual notice of the defendant's representation when the defendant told them he had just received a phone call from his attorney who advised him not to talk. In view of this it would seem doubtful that further inquiry, even with respect to the Seven-Eleven robbery, could be justified. At this point the police were certainly on notice that an attorney had entered the criminal proceeding then under investigation. Under the holding of *Arthur* any subsequent waiver of counsel should have been "in the presence of the attorney" (*People v. Hobson, supra,* 483).

It follows from the foregoing that the People's attempts to bring this case within a recognized exception to the *Arthur* case are not well founded. If the rule of the *Arthur* case is to be given its plain meaning, which it must, "any statements elicited by an agent of the State, however, subtly, after a purported 'waiver' obtained without the presence or assistance of counsel, are inadmissible" (*People v. Hobson, supra,* 481).

In defense of the People's position, it does appear that the defendant intended to consciously disregard the advice of his attorney. However, the situation should not have been allowed to advance to this point. Where the rule of *Arthur* applies, it is "unequivocal", and it applies to a defendant in custody, whether as an "accused", a "suspect" or even a "witness" (*People v. Hobson, supra,* 483). The rule, as it has evolved, is grounded upon constitutional principles, and the requirement that a defendant's attorney be present to effectuate a valid waiver "breathes life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary. Indeed, it may be said that a right too easily waived is no right at all" (authorities omitted) (*People*

v. Hobson, supra, 484). The rule of *Arthur* has validity and worth apart from its application to any particular case. It is this overriding value with its emphasis on individual rights which compensates for what might otherwise appear to be an aberrant result.

Based upon the foregoing this Court is constrained to conclude that the purported waiver of counsel made by the defendant at the Fishkill barracks on December 23, 1974 was ineffectual and that the subsequent statements elicited from him, both at Fishkill and at Newburgh, which relate to the instant indictment are inadmissible. Neither the Seven-Eleven robbery nor the Millbrook burglaries is the subject of this Court's jurisdiction, and with respect to these other crimes, the Court intends no controlling findings or conclusions.

This constitutes the decision and order on the motion.